Quick Notes:
What is contract law?
Mainly case law- what courts say the law is- general principles of law for contracts

The Restatement of Contracts
The view of very smart people about what the law is and should be
Courts are not obligated to follow the restatement (but it is very important for the bar exam)

Critical Terms:
- Express Contract: “verbal”- based solely on words
- Implied Contract: based at least in part on conduct, cannot find a deal simply from words
- Quasi Contract: “equitable remedy”- it is not contract law- when the application of contract law would result in an unfair result
- Bilateral Contract: A contract that results from an offer that is open as to the method of acceptance- anytime the offer does not require a particular form of acceptance
- Unilateral Contract: Performance as acceptance
- Executory: has not yet been performed

UCC Article 2
When does article 2 apply?
- Sale of Goods- movable personal property
  - Never applies to real estate or employment/service
- Mixed deals- Paying for goods along with labor- 2 part rule:
  - What is the more important part of the deal?
    - Is it basically a sale of goods or a sale of service?
  - All or Nothing- either article 2 applies to all of the deal or it does not apply

Relationship between Article 2 and Common Law Contract
- Overlap- most answers under Article 2 are the same as Common Law
- Common Law deals with issues that Article 2 never addresses
  \[\therefore\] focus on situations where UCC dictates different answer from Common Law

Haley: group types of cases in review to know common issues for 3 important fact pattern types:
1. sale of goods
2. employment contracts
3. construction contracts

Basic Contracts Questions to ask yourself when you see the fact pattern:
1. Is there a deal (promise)?
2. How do courts enforce the deal (promise)?
3. Is there any reason for the court not to enforce the deal (promise)?
4. Exactly what is the deal (promise)? What was agreed to?
5. Did anyone fail to do what he agreed to do?
6. If someone failed, is there a legally recognized excuse?
Is there a deal?

Offer and Acceptance

- If both offer and acceptance then “manifestation of mutual assent”
  i. Revocation of an Offer: Offeror has power to revoke
  ii. Rejection of an Offer: Offeree has power to reject

- 3 possible issues
  1. Was an offer made?
     - Look for manifestation of commitment (not subjective intent- objective standard)
       o Offer must give offeree power to form a binding contract
     - Content- interpretation w/in the “four corners of the document” p62
       o wording of the deal
         - *Fairmont Glass Works v. Gruden-Martin Woodenware* (glass jar case) p64
           o “for immediate acceptance” objectively would mean
             “we will sell at these prices if you accept immediately”
           o definite enough – industry standard for “gross” that
             implies definite details w/in the context of the industry
     - Look for missing terms
       - does not need all material terms
       - missing price problem
         o Common Law: w/out price no manifestation of commitment
           ∴ no promise
         o UCC: a communication can be an offer even without missing price term
     - Look for ambiguous terms
       - Fair, reasonable, etc
         - Ex. *People v. Braithwaite* p.64- offer to sell cocaine- an offer
           must be definite enough that the offeree knows the bargain terms
           and how to conclude the bargain (how to accept)
       - Common Law: if price in ambiguous terms then no contract
       - If something is left out, it may not be important to the offeree ∴ could have
         left term to be added later
  2. UCC 2-306 Output, Requirements, and Exclusive Dealings
     - Requirements Offer p.238
       - Buyer offer to purchase all the X he require from seller.
       - Seller agrees to supply whatever X the buyer needs
     - Output Offer
       - Buyer agrees to purchase whatever goods the seller can produce
     - Exclusivity Agreements
     - Creates problems with drastic increase or decrease in demand/price
       o Order said to be “unreasonably disproportionate”
         - UCC restriction on discretion- it must be comparable/reasonable
       o *Eastern Air Lines v. Gulf Oil* p. 238 agree to price for jet fuel then Mid-east
         oil embargo sky-rockets oil prices- Gulf argues no consideration b/c
         Airlines could “require” nothing if they wanted to
         - Court Rules: consideration b/c obligation to act in good faith
     - context- evidence extrinsic to the document
       o bargaining history
       o *Advertisements* p.68
         - general rule: advertisement not an offer
• invitations to make an offer
• exception if it would lead a reasonable prospective buyer to construe as offer
  • Is ad specific? about:
    • # of items available
    • who can accept/ how to accept
• Lefkowitz v. Great Minneapolis Surplus Store p.68
  • first-come first-serve 3 fur coats at $1 each then later ad for stole- store refused sale b/c it intended the ad for women- court rules the ad was “clear, definite, and explicit” ∴ an offer
• Leonard v. Pepsico p.70
  • Pepsi promotion to collect points for prizes has commercial with Harrier Jet for 7 mil pts – man demands jet & sues for specific performance
  • Commercial cannot be offer b/c indefinate: it specifically directed to catalogue for details (no jet in catalogue) & it did not have “words of limitation” like first come, first serve
  • ***The order form and the points were the offer***
    • ad was a solicitation for offers
    • no enforceable contract until pepsi accepts
  • price as mistake b/c jet would only cost $700,000 instead of 23 million- should have known deal to good to be true
• Carlill v. Carbolic Smoke Ball Co. p. 119
  • Ad specified purchase of the product ∴ unilateral contract offer because performance- purchase of product- was how to accept the offer
    • Use and contracting illness were express conditions
  • Haley: says if she had bought it before the ad, then no reliance/inducement ∴ no contract

2. Was the offer terminated? (ways to terminate an offer) (p.108)
  • Expiration/Lapse
    • Must accept within the time and procedure prescribed by the offeror
    • What if nothing was said about a deadline?
      • If no expressed time/procedure, courts will impose “reasonable” time/procedure
      • Courts look at: when the offer was made and how long before a response?
    • Ex. Vaskie v. West American Insurance Co. p.108
      • Car accident- insurance co. offers to settle for $25,000, the offer does not specify a date when it would terminate- V accepts offer, insurance claims no contract b/c statute of limitations ran on claim before acceptance- court will not make rule that fixes termination date for settlement offers by statute of limitations
      • Offeror as master of their offer must fix an expiration date themselves, b/c they did not the court will not impose one- question of reasonable time is a disputed issue of material fact ∴ jury must decide
    • Ex. Keller v. Bones p.86
      • Sale of real estate- buyer specified offer had to be accepted by 5- seller sent acceptance to agent at 4:53, buyer notified at 5:12, court rules language “upon execution” references signature not communication- w/ no
Time specified “reasonable” time allowed & 12 min. is reasonable + both parties acted in manner consistent with contract ∴ intent

- **Death/mental incapacity** of offeror before acceptance (if accepted 1st duties pass to estate)

**Revocation**

- Pulling the offer off the table
  - Can be done anytime before the offer is effectively accepted
    - Acceptance must be communicated
    - Revocation must be communicated
  - *Hendricks v. Behee* p.113
    - Sale of real estate- buyer made offer, seller accepted, but before seller notified buyer revoked
    - No contract until acceptance of the offer is communicated ∴ offeror may revoke until acceptance is communicated
    - Revocation must be communicated as well
    - Notice to an agent, within the scope of the agent’s authority, is binding on the principal- buyer notified real estate agent of revocation before acceptance

- **Mailbox rule** does not apply to revocation- it must be received

- “**Indirect Revocation**”: offeree reliably hears of offer withdrawal from another source (114)
  - *Dickenson v. Dodds* p.115
  - Can revoke even if the offer states it will be kept open for specific period (112)

3 things to know about revocation:

1. **how it happens**
   - Look at the words/conduct of the offeror that were communicated to offeree
   - Must be communicated

2. **when it happens**

3. **when you can’t revoke**

- **Option Contracts**
  - An offeror promises to leave offer open in exchange for consideration
    - Consideration compensates for risk of leaving offer open
    - Courts are less likely to question consideration if it is for an option
    - Consideration doesn’t have to be exchanged- just written/signed
      - Nominal or sham consideration ok for option contracts
  - Offer will continue even if offeree rejects/makes counteroffer, or if offeror dies/losses capacity p.283
    - Quotes restatement: bidding = option contract to extent necessary to avoid injustice
    - Use of the subcontractor’s bid in the general contractor’s bid = part performance ∴ acceptance- **part performance** ∴ contract – bid offer cannot be revoked
    - Court comments that many theories can hold subcontractor to bid (294)

- **Reliance**
  - Contractor/subcontractor situations
    - *Drennan v. Star Paving* p.286
Subcontractor submits bid but mistakes amount & general contractor detrimentally relies on the bid in their own bid for the larger project. Court Rules: reliance via school bid counts as part performance & the offer was irrevocable once accepted (once larger school bid)

- **Expectation damages**: diff. b/w bid and cost of 2nd co.
- **Promissory Estoppel** according to Traynor- subcontractor should expect bid would induce general contractor to include in gov’t bid
- General Contractor’s acceptance was **conditional**: until acceptance of the bid the subcontractor can revoke, once acceptance irrevocable
  - Learned Hand decision earlier says
  - Reliance leaves offer revocable
  - James Baird v. Gimbel Bros  p 289
- **Part Performance**
  - Unilateral contracts- part performance is acceptance
  - Option contract once offeree begins performance p.285

- **Firm Offer (UCC 2-205)** p.294
  - Writing signed by merchant expressly promises that offer will not be revoked
  - All portions are essential- written, signed, etc.
  - 3 month ceiling no matter how long document agrees to leave open

- **Rejection**
  - Express rejection- outright decline before time lapse
  - 3 other ways to reject
    - **counteroffer**
      - a new offer by the offeree- 1st offer disappears, offeree now offeror
    - conditional acceptance
      - I accept provided…
    - If performance, then implied contract
    - Focus on mirror image rule: acceptance unless effects material terms of the contract- mirror image rule could be in effect, but trend is to focus on whether intent to contract is apparent
  - **Additional Terms**
    - Common law: I accept and … adding term, not a condition ∴ no express contract
    - UCC 2-207: Exchange between merchants- adding a term is not rejection!
    - “seasonable expression of acceptance”
      - need I accept “provided that” to specify condition
      - contract unless specified condition or term is a material change

3. **Was the offer accepted**
   - Acceptance must be knowing, voluntary, and deliberate act
   - Determined with regard to a reasonable objective meaning of the response
   - Fact patterns go two ways in acceptance issues
   - 1) Who is accepting
      - Only the person to whom the offer was made can accept
      - Offers cannot be transferred
      - Offeree must know of the offer at the time of acceptance
• Inadvertant Acceptance
  • _Glover v. Jewish War Veterans_ p.102- reward for info leading to arrest of murderer offered in newspaper, mother of murderer’s GF gives information when questioned by the police (did not volunteer) then find out there was a reward
    i. w/ private rewards, no contract unless the reward induced the action- must have acted with the intent to accept rather than other motives

• 2) How are they accepting
  • _Mirror image rule_ p. 91 must substantively agree to the exact same thing
  • New rule says you can add on, so long as you don’t alter material term
  • must accept substantive content (terms like price) and procedural (how to accept)
  • _Roth v. Malson_ p.92- Sale of real estate, buyer signed standardized form on the “counter to counter offer” line, seller took this as a counter offer and rejected- court rules signing on the wrong line of a standardized form is not acceptance, but dissent says this is counter to the reasonable expectations of the parties b/c the language and actions support intent dissent believes this should have been a valid contract acceptance (“magic words”)

• Silence as Acceptance p.105
  i. General Rule: Inaction = rejection even if offeror says otherwise
    1. Exceptions from Restatement
      a. Offeree takes benefit knowing compensation expected
      b. Offeror specifies silence can be acceptance & offeree intends silence to be acceptance
      c. Previous dealings establish acceptance- no need to act
      d. Offeree acts inconsistent w/ offeror’s ownership (if really bad then acceptance only if offeror okays)

• Offeror is master of the offer
• Bilateral or Unilateral
  • Today considered bilateral unless offeror specified acceptance thru. Performance
  • When it is unclear, courts usually accept either promise or performance (119)
    i. Unless it clearly requires acceptance only by performance either is ok (125)
  • If unilateral in offer, no notification is necessary to make the acceptance effective unless the offer requests notification (126)
  • Unilateral examples
    i. _Carlill v. Carbolic Smoke Ball Co._ p.119
      1. Ad offers $100 if customer gets a cold after using the smoke ball, customer gets the flu
        a. Condition for acceptance was purchase of the product, enforceable like specific Ads- anyone who performs accepts the offer :: $100 for plaintiff customer
        b. Haley says use and illness were express conditions, but makes the point that what constitutes performance could be debatable - performance just to buy? Buy and use? Buy, use, and get sick?
    ii. _Harms v. Northland Ford Dealer_ p.122
      1. Gold tournament – car for 1st hole-in-one on 8th hole- car dealer had insurance based on distance (man’s tee) woman won so they denied the car
        a. Distance was not a condition because it was not announced
        b. Unilateral contract with performance as acceptance
i. Accepted by entering the tournament, fulfilled conditions by getting hole-in-one. ∴ value of car for π.

- 4 Common fact Patterns:
  1. Mailbox Rule
     - When it is acceptable to accept by mail, acceptance is timed with postmark
       i. Offeror can avoid mailbox rule by specifying a different form of acceptance or that acceptance will only be effective upon receipt (100)
       ii. 
            Cantu v. Central Education Agency p.99- teacher submits resignation, superintendent accepts by mail, teacher withdraws her resignation after mailing but before receipt
            - contract acceptance at postmark ∴ cannot withdraw
       iii. Osaka v. Hall- insurance company authorized mail as means of paying premiums. ∴ mailbox rule applies
            1. Haley says court decided based on what was fair- they found adequate communication here just like interpreting “upon execution” in Keller v. Bones to allow 12 min. for notice
  2. Part Performance in response to offer
     - General Rule: the start of performance generally constitutes acceptance
       i. Viewed as implied promise to perform
     - Unilateral Contract- the full performance is acceptance
       i. But partial performance is reliance ∴ same outcome w/out acceptance- it blocks revocation by making the contract an option contract (127)
  3. Notice of Acceptance
     - Must be communicated, unless offeror dispenses w/ communication
       i. “Upon execution” from Keller v. Bones p.87
       ii. For performance, person must reasonably know about the performance
          Ex. painting the house the offeror is living in, unlikely you need formal notice because the person is there to see the performance
     o Hendrick’s v. Behee p.112
       ▪ Sale of real estate- buyer made offer then seller accepted, but before seller notified buyer revoked
       ▪ No contract until acceptance of the offer is communicated to the offeror
       ▪ Notice to an agent is binding on the principal
  4. Sale of Goods
     a. 3 principles for forming contract for the sale of goods under UCC Article 2
       i. words & conduct show intent
       ii. contract may be found with or without exact moment it formed
       iii. okay to leave terms open (but need intent and reasonably certain remedy to collect on breach)
       iv. principles applied in common law & also for cases that are not sales of goods
     b. Acceptance under UCC 2-206 p.132 revised in handout to 2007 version
       i. Unless otherwise unambiguously indicated
          1. An offer invites acceptance in any reasonable manner/medium
          2. Orders invite acceptance by prompt promise to ship or shipment of conforming or nonconforming good
             a. Nonconforming is not acceptance, but counteroffer
          ii. If performance is reasonable acceptance, and offeror not notified w/in reasonable time- may treat as lapsed
iii. Expression of acceptance is acceptance even w/ additional terms
   • Buyer offers to buy goods but the seller sends the wrong stuff
     i. 2 consequences
        1. Acceptance- it creates a contract
        2. Breaches the contract it created
     ii. Accommodation exception
        1. The seller sends the wrong item but explains
           a. this is a counteroffer, not an acceptance

**How do courts enforce the deal (promise)?**

**Remedies**

- aggrieved party supposed to be as well off as if the contract had been performed
- Never punitive damages (unless tort overlap- but never for contract issue)

**Liquidated Damages**

- Contract provision that fixes the way to measure damages
  - Parties cannot set out amount that would become punitive
    o If it is a disguised penalty it will not be upheld
  - Ex. w/ sales of property, deposit is often liquidated damages

**Expectation, Reliance, and Restitution**

- Restatement
  - Expectation: as good a position as would have been w/ contract
    - benefit of the bargain (most generous)
  - Reliance: as good a position as he would have been if no contract (medium generous)
  - Restitution: restores any benefit already conferred on the other party (least generous)
- Restitution for benefits conferred does not consider cost of the benefit
  - Ex. glass of wine- restitution would be value of the glass, not the cost of the bottle- reliance would cover the bottle- expectation damages would include expected profit
  - Freund v. Washington Square Press p.640
    - Contract to publish manuscript if ∆ fails to publish w/in 18 mo.s contract terminates
    - Publisher refuses to publish
    - Court Rules: author gets only nominal damages (not cost of publishing)
      - Expectation damages should be foreseeable, measurable w/ reasonable certainty, and proven
        o Cannot recover more from the breach than would have gained in k
        o Was not a k to publish, but to get royalties from sales
      - Expectation interest: royalties from % sales too speculative
      - Court Rules: Restitution interest: return the manuscript
  - Efficient Breach
    - Taking into account damages, breach would be profitable for both parties

**Expectation Damages**

- Compensation for loss of value of contract
- Expenses saved by breach must be accounted for
- Indirect losses- plaintiff’s costs in coping with the breach
  - Ex. cost of arranging substitute performance
- Consequential losses- arise as a consequence of breach
  - Ex. lost profits if party can’t conduct business
  - Consequence b/c stemmed from profit of secondary activities affected by breach
So long as double-counting does not occur the distinction makes little difference

Measurement

- losses suffered less gains or savings resulting from breach
- Carpel v. Saget Studios Inc p.648
  - No pictures of wedding- couple wants cost of restaging and photographing
  - Must establish losses with **reasonable certainty**
  - Sentimental value of photos is too speculative
  - 10,000 to restage wedding is excessive for $110 k
- Procopis v. GPP Restaurants p.651
  - Sale of land & diner- deposit in escrow, condition that buyer could get financing and couldn’t- sellers want difference b/w the 2nd contract price and the fair market value- no proof offered of the fair market value of the property
  - Court Rules: 2nd k price as evidence of fair market value is insufficient proof
- Handicapped Children’s Education v. Lukaszewski p.653
  - Hired speech thereapist, then she gets offered a higher paying job closer to home, submitted resignation & board refused gets a Dr note saying she cannot travel long distances & resubmits resignation
  - Only 1 qualified person applied to replace and she cost more- claiming damages of additional compensation required for **substitute transaction**
  - Paid more, but more qualified replacement
  - Court Rules: damages for breach are based on expectation- they expected to have her, not someone more qualified at a higher price- replacement’s greater experience was imposed on them .:. not a benefit
    - Cannot hire anyone and get compensated- must **mitigate**, but here only 1 qualified applicant .:. obtained service at lowest possible cost
- Partial Performance: to the extent it has value to the plaintiff, should be deducted
- If performance was excused, adjust to reflect savings
- Usual measure for construction cases is cost of completion or repair
  - Jacob & Young v. Kent compared to Lyon v. Belosky
  - In Jacob & Young v Kent- wrong pipes- damages were market value
    - Fixing would be unfair forfeiture or unreasonable economic waste
  - Lyon v. Belosky- custom home- damages based on cost of repair
    - Motivation of non-breaching party was aesthetic value
    - Weigh extent of waste, motivation of non-breaching party, willfulness of breach
- **Peeveyhouse v. Garland Coal & Mining Co.** p.659
  - Leased land for coal mining w/ agreement for remedial work- suing for cost of remedial work- co. argues damages should be limited to depreciation in land value (way less than cost of remedial work)
  - Court Rules: damages based on decrease in market value
    - Economic benefit disproportionate to performance cost

Limitations to Expectation Damages

- 3 principles limit recovery
  1. **reasonable certainty** ("not absolute certainty")
     - must prove economic damage
     - consequential are the hardest to prove
     - **Mears v. Nationwide Mutual Insurance** p.674
       - Won 2 mercedes- benz in co. employee contest for theme
• Certainty of prize- Contest specified diff. prizes, but told he won the cars
  o Ambiguous contract can be made certain by subsequent actions or declarations
  o Witnesses present verified they thought he won cars
• certainty of prize value
  o asked 2 dealers then testified to value of cheapest new Mercedes-Benz
• Court Rules: $60,000 in damages (value of 2 cheapest)
  ▪ Locke v. United States p.677
    • Gov’t typewriter repair contract to be one of 4 companies agencies can use- then removed from list
    • Deprived of value of competing against other 3
    • If reasonable probability of damage, uncertainty will not bar recovery
    • Lowest bid- chance of obtaining at least 25% of the business
    • Remanded- determine amount of business, reasons co. might not have gotten business, avg. per unit cost of repair work, & expenses incurred in preparing to fulfill repair work from k
  ▪ ESPN v. Office of Commissioner of Baseball p.681
    • ESPN paid for right to broadcast baseball games, then didn’t
    • Basic k performed b/c $ for right to broadcast
    • Baseball wants consequential damages but based on prestige
    • Court Rules: too speculative
      o If they could show lost sponsor or revenue then maybe
    • Note: new businesses can never prove damages like older b/c they don’t have the reference point or profits

2. Foreseeability
  ▪ Hadley v. Baxendale p.685
    • Recoverable damages must be foreseeable at time k entered
    • Windmill in a small town breaks- company sending the machinery to fix the mill breaches by taking too long. They sue for damages for lost profits from the time the mill had to be closed because of the late shipment.
  ▪ Wullschleger v. Jenny Fashions p.689
    • Fabric manufacturer sues dress maker who didn’t pay for fabric, counter-claim for lost profit b/c fabric was bad
    • Court Rules: circle skirts=normal use ∴ dressmaker wins
      o If circle skirts had been a special use w/in the industry, and buyer didn’t inform of special need, then damage would not be foreseeable
      o UCC buyer can collect based on any requirements seller had reason to know at the time of contract
  ▪ Foreseeability satisfied by notice of special requirements
    • Kenford Co. v County of Erie p. 694
    • Land for sports dome donated in exchange for 40 yr lease or long-term management contract
    • County breach b/c building costs exceeded expectations
• Kenford had purchased land around stadium expecting increase in value
• Court Rules: no damages for land value b/c county did not foresee he would purchase lots of land w/ that expectation

3. Mitigation
   - Burden on non-breaching party to reduce consequence of breach
   - Not required to act, but cannot collect for damages that could have been avoided
   - Rockingham County v. Luten Bridge p.697
     • Bridge to nowhere
     • County board claims should have stopped building to mitigate
     • Cost of completing bridge fell on bridge co.
   - Parker v. 20th C Fox Film 698
     • Contract for actress to play lead- fox breaches & offers role in another move- actress declines- fix claims π didn’t mitigate
     • Employer must show other employment was comparable
     • Court Rules: movies were different
       o Employees are not required to take offers for substitute positions in order to mitigate
     • Dissent: just having differences b/c the two jobs shouldn’t excuse employee from mitigating
       o Construed this way the only job offer the employee could take to mitigate would be the job he had
       o Should be difference in the kind of employment
   - Marchesseault v. Jackson p.703
     • Construction of foundation for home- did poor job so owner hired a second contractor- visible flaws left after repair ∴ damages for loss in home value+ payment on k
     • Was he required to destroy the foundation to prevent visible flaws to mitigate decrease in the value of the finished home?
     • Court Rules: no, reasonable, though unsuccessful, efforts were made to avoid the loss (hired another contractor)

   - Expectation Damages under the UCC

     • Differences
     • Incidental Damages p.707

       1. Can recover for expenses incurred in stopping delivery, transportation, returns etc. after breach

Reliance p.708
• Costs incurred in reasonable reliance (even if full expectation damages are not recoverable)
• Reimbursement smaller than expectation damages would be
• Must establish with reasonable certainty
• Must be in reasonable contemplation of the parties at the time of k
• Hawkins v. McGee p.711
  o Hairy “perfect” hand
• Sullivan v. O’Connor p.711
  o Nose operation- appearance worsened- could not demonstrate loss of job was due to nose
  o Uncertainties in medical science mean Drs cannot promise specific results
  o Pain and suffering related to an operation would be incurred even if it had been successful, but not for subsequent surgeries to fix the problem
psychological and physical injury are within reasonable contemplation & recoverable

Expectation damages cannot be established with certainty but reliance can

**Hollywood Fantasy v. Gabor p.716**
- Fantasy vacation with stars - Gabor backs out - expectation damages for revenue from TV spot etc. were too speculative, but out-of-pocket costs - **reliance** - could be determined for the event

**Sullivan v. Oregon Landmark-One p.721**
- Lease for bookstore and restaurant - renovations exceed cost L anticipated - attempted to recover value of their work to get ready for restaurant - only out of pocket expenses not hours spent preparing

**Reliance in losing contract**

**Restitution** p.725
- Giving back benefits received - preventing unjust enrichment

**Bausch & Lomb v. Bressler p.726**
- Exclusive right to distribute eye diagnostic instruments - delayed delivery and sold violating exclusivity - B&L couldn't prove it would have made the sales S did absent the breach b/c it was a losing contract S entitled to offset expectation damages
- Restitution is available even if the plaintiff would have lost money on k
- Stated terms “nonrefundable” contract terms do not control restitution
- Difficult to calculate, but should take into account value of years of exclusive right

**Measurement**
- If no performance then full refund
- If part performance, reduce by market value of enrichment

**Earthinfo v. Hydrosphere p.731**
- Software development contract
- Dispute over derivative products, Earthinfo ceases royalty payments
- Royalties were not due on derivative products, but material breach by not paying at all - recission
- Determine what portion of profits were attributable to Hydrosphere software and give back in restitution
  - If particularly egregious courts may demand all profits as restitution

**Limits of Restitution**
- If substantial performance, restitution cannot act as if no contract
- Cap on restitution at k price (cannot be better off than if k performed)
- If breaching party owes money and all other performance complete then no restitution instead pay contract price
- If no substantial performance,

**Agreed Remedies** p.737

**Specific Performance and Injunctions** - exceptional remedy, very unlikely
- Court ordering someone to do what they agreed to do in the contract
  - An equitable remedy - (equity courts in early England)
    - Employed only where legal remedies are viewed as inadequate
    - Damages are the legal remedy to specific performance
  - Real Estate deals
    - Specific performance is an available remedy
Each piece of land is unique \( \therefore \) specific performance

- Sale of Goods
  - Only specific performance if it’s unique- unique means:
    - Art
    - Antiques
    - Custom made

- Never for service
  - Injunctive relief but not to enforce a service

**Is there any reason for the court not to enforce the deal (promise)?**

Court remedy for fraud is avoidance claim to make the contract **voidable**: victim can choose whether or not the contract remains in effect p.323

(other remedies = enforcement w/out bad term or money but less common)

- Diff. from “void” b/c that basically means the contract never existed
- Basically cases where person never meaningfully assented, they could assent now
- Victim may sue for avoidance or defend w/ avoidance if sued
- If victim chooses no contract- to **rescind**, then restitution for both parties for unjust enrichment up to avoidance & other party cannot try to enforce contract
- If victim chooses contract, the other party can not claim it is avoidable
  - Victim can get damages related to fraud
  - Punitive damages are controversial (343)

**Capacity**

- Incapacity makes the contract **voidable**

- 3 groups lack capacity
  - minors (anyone below age of majority usually fixed by statute)
  - mentally incompetent
  - intoxicated- less common

- **Minors**
  - Always measured purely on age, not dependent on maturity, independence, etc.
  - Can avoid contract even w/in reasonable time after reaching age of majority
  - Once beyond reasonable time, constitutes ratification of the incurred debt
  - *Webster Street Partnership v. Sheridan* p.423
    - 2 brothers (minors) enter into lease
    - leasor wants rent b/w default and relet- brothers want security deposit
    - Court Rules: minors can’t contract \( \therefore \) voidable \( \therefore \) leasor must refund all $
      - Exception if emancipated minors or contracting for necessaries
        - Necessaries includes the basics, but can include things that go beyond bare subsistence as well
        - If un-emancipated minor contracts for necessaries, parents are unjustly enriched and may be liable for costs b/c alleviates their need to provide that necessary
        - Housing was not necessary b/c they could have stayed w/ parents
      - One bro. reached age of majority 7 days before leaving, but reasonable time to avoid
    - *Halbman v. Lamke* p.424
      - Minor buys a car, owes 150 when part breaks costing 600, garage kept the car b/c he didn’t pay the bill- minor disavows sale and demands $ back- minor sues to avoid k
      - Court Rules: minor gets $ back
        - Seller claims he should get restitution- losses for value of the car
Court Rules: if minor had car would have to return, if he no longer possesses the item then restitution does not apply
- Holding minor to the value would basically be holding to the contract

Zivich v. Mentor Soccer Club Inc p.427
- Enrolled in soccer club w/ disclaimer of liability for negligence- boy gets injured
- Court Rules: disclaimer valid
  - Parents argue disclaimer does not cover post-practice- court says it does
  - Public policy reason to enforce: invalidation of liability disclaimers would reduce community activities and deter volunteers
  - Invalidating parents right to release liability for children is inconsistent with other powers given to parents over children (ex. medical consent)

Shields v. Gross p.430
- Brooke Shields 10 yrs old- mother entered modeling contract for her- photos resurfaced yrs later
- Shields sought to avoid contract made by her mother and enjoin from use of photos
- Court Rules: consent in contract wide enough for continued use
  - Interpreted statute as removing child’s right to disaffirm parent’s consent
  - Dissent: statute only governs initial consent procedures, not right to disaffirm

- Mental Incapacity
  - Adult presumed to have capacity- must overturn presumption w/ evidence of incapacity at time entering into contract- usually requires expert testimony
  - “cognitive test”: unable to understand nature and consequences of transaction b/c incapacity
  - “motivational test”: understood transaction, but incapacity affected ability to act rationally in relation to k
  - Restatement on Mental Incapacity p.432
    - Voidable under either cognitive or motivational test
    - Exception- if fair terms, w/out knowledge of incapacity, & avoidance would be unjust then court can grant relief as justice requires
  - Court weighs how obvious the incapacity was to the other party

Farnum v. Silvano p.433
- 90 yr.old sells house for ½ market value to trusted buyer (mowed her lawn)
- evidence of mental incompetence yrs preceding sale- brain scan disclosed disease
- Nephew (guardian) told Silvano price was too low
- At closing, Farnum’s lawyer provided by Silvano- seemed aware but told people she still owned the house afterward- “coherent interval”
- Court Rules: rescission for old woman (restitution for Silvano)
  - Even if aware of sale, did not comprehend unreasonableness/consequences
  - Motivational test
  - Silvano knew about incapacity & knew price was too low

Hauer v. Union State Bank of Wautoma p.438
- Woman w/ brain damage has mutual fund (able to care for herself)
- Man in financial trouble convinces her to get loan for him w/ mutual fund as security
- Broker told bank about brain damage & that she needed the $ for living expenses
- Sued for avoidance when bank tried to foreclose on mutual fund
- Court Rules: woman did not have to repay loan
  - Generally cases have restitution (she would have had to pay the loan), but not necessarily if fraud or knowledge of incapacity by the contracting party
    - If they knew of incapacity or took unfair advantage, then benefit does not need to be restored
Barbri: 2 exceptions

1. Implied Affirmation
   a. If person retains benefit post-lack of capacity, then implied affirmation

2. Necessaries
   - If the person lacks capacity, but the benefit was something necessary then they are obligated to pay
     - In apartment case, boys could live with parents \(\therefore\) not necessary
     - Quasi contract?

   ▪ Is there a Capacity issue?
     - Who made the agreement? Did each of the parties have capacity?
     - How was the deal made?

Duress p. 345

- Compulsion of manifestation of assent by force or threat
  - Plaintiff makes improper threat
    - Defendant had no reasonable alternative

- Restatement 175: Threat makes a contract voidable when...
  - Party’s manifestation of assent is induced by an **improper threat** that leaves the party w/ no reasonable alternative

- Restatement 176: Threat is improper when...
  - Could be crime or tort
  - Threat is criminal prosecution
  - Threaten use of civil process in bad faith
  - Breach of duty of food faith dealing under a contract
  - If resulting exchange is not on fair terms AND
    - Would harm recipient w/out significant benefit to threator
    - Effectiveness of threat increased by prior unfair dealings
    - Threat is use of power for illegitimate ends

- Haley: the issue w/ most duress cases is whether or not the threat was improper
  - Threats that are NOT duress:
    - Labor disputes- we’ll strike unless we get a raise
    - Settlements- if you’d don’t pay us, we’ll got to court
    - Employment- “take it or leave it” terms

- **Germantown Manufacturing v. Rawlinson** p.347
  - Rawlinson’s husband embezzles $ from work, Germantown, co. lawyer brings judgment notes to sign to waive right to defend (a confession) – there are 2 notes- Rawlinson thought she was only signing for the 1\(^{st}\)- told to cooperate or criminal prosecution of husband
    - Fraudulent Misrepresentation: liability seemed limited to 160,000 but 2\(^{nd}\) note was open
    - Fraud in Factum: did not know she was signing the 2\(^{nd}\) note \(\therefore\) couldn’t know terms
    - Materiality: would have induced a reasonable person to sign
    - Duress: cooperate or criminal prosecution of husband
    - Haley: duty for lawyer to tell her b/c he knew the only reason the 2\(^{nd}\) note was open ended was the possibility to get more money
      - These cases are more concerned w/ surrounding facts b/c need to know state of mind for assent to judge if they intended- ex. Rawlinson had just miscarried

- Duress by 3\(^{rd}\) party unknown to beneficiary
  - **US Trane Co. v. Bond** p. 354
    - Wife abused by husband to sign surety bond
Serious physical imminent fear of death/injury duress renders contract void
- **Void NOT Voidable**
  1. If voidable, then only benefits victim, ignoring the reliance of the innocent party. ∴ void instead
  2. Restatement 174- void if physical even if by 3rd party
  3. Restatement 175- voidable by victim unless other party innocently relied
- Duress and Bad Faith Relation in **Contract Modification**
  1. Rinck v. Association of Reserve City Bankers p.357
    - Companies merging, Rinck led to believe that she would not be terminated & would have same salary and benefits- then after merge she gets fired
    - Issue: new consideration required for modification of employment contract
    - Continued employment through merge could have been *preexisting duty*, but b/c of merge she considered leaving and only stayed b/c of promise
      ∴ consideration & contract
      they needed her to stay to help w/ merge so they promised job security
  2. **Supervening (unforeseen) difficulties**
    1. Exception to the preexisting duty rule allowing contract modification w/out new consideration b/c if an unforeseen difficulty
      - Performance subject to unforeseen burdensome difficulty
      - Fair dealing- not coercing further compensation
      - New obligations w/in new contract post-modification are reasonable
    2. UCC 2-209 Modification, Rescission and Waiver p.367
      1. Agreement modifying contract of sale of goods does not need consideration to bind
      2. Agreement that excludes modification or rescission except by signed writing cannot be modified or rescinded any other way
      3. Must satisfy statute of frauds
      4. Note: UCC Article 2 has no provisions for Duress, Incapacity, Misrepresentation, etc.
- **Economic Duress**- could be market/circumstantial pressure not duress
  1. Quigley v. KPMG Peat Marwick LLP p.352
    - Sign arbitration agreement or you’re fired
    - “Take it or leave it” terms for obtaining or keeping a job are not furess
    - duress is more egregious than *market pressure* faced by every employee in need of work
  2. Austin Instrument Inc. v. Loral Corp. p.360
    - Contract for radar gears- co. demands more $- threatens to stop delivery- could not get gears elsewhere- Loral pays price increase then sues for damages for price diff. after contract is complete
    - Economic duress b/c they threatened break of contract ∴ Loral gets damages
  3. 2 common fact patterns for duress (Barbri)
    1. Modification in Contract
      1. Alaska Packers’ Association v. Domenico p.359
        1. San Francisco Fishermen agree to contract for employment w/ cannery before moving to Alaska, when they get to Alaska they realize others in Alaska make more $ so they demand more $- Company can’t get other fishermen mid-season so they agree to pay then reneg and refuse to pay more than original contract
          - No consideration for the new contract b/c working was a pre-existing duty from the 1st contract
          - **Duress** b/c co. could not find fishermen mid-season- no choice
      2. Litigation Settlement
Plaintiff must have acknowledged that she owed more than the settlement amount

**Undue influence** p.369
- Plaintiff: Not improper threat, but unfair persuasion
- Defendant: must be under domination of plaintiff
  - fiduciary relationship
- Restatement 177- if undue influence then may avoid contract
  - If 3rd party exacts undue influence, victim can avoid unless beneficiary did not know and acted in good faith
  - Rich dancer leaves $ to dance foundation w/ lawyer’s help
  - Family says lawyer exacted undue influence
  - Issue for undue influence cases: mental status of promisor
    - Must have free will, intention, and assent
  - Evidence dancer contemplated for a long time, was surrounded by friends and advisors, & healthy enough to consent ∴ no undue influence ∴ not voidable
- *Tinney v. Tinney* p.372
  - Gold-digger handyman moves into huge mansion then husband dies & he romances widow for $
    - Threatens to leave if she doesn’t adopt him
    - Gets her to deed ¼ interest in the property
  - Court Rules: undue influence ∴ conveyance of interest in mansion is void
- *Odorizzi v. Bloomfield School District* p.375
  - Elementary school teacher arrested for homosexuality then superintendent and principal get him to sign resignation
  - Court finds elements of undue influence
    - Lessened capacity to contract (had not slept for 40hrs)
    - Excessive strength by dominating party – imbalance of wills
    - Outlines 7 signs of undue influence p. 379
      1. Unusual time
      2. Unusual place
      3. Demand for immediacy
      4. Threaten consequences for delay
      5. Outnumbered- multiple dominant people
      6. Absence of 3rd party advisors
      7. Told there is no time for lawyers or accountants

**Fraudulent Misrepresentation**
Haley: 3 points to keep in mind for fraud cases- Fraudulent Misrepresentation involves:
- lies of fact
- at the time of formation of the contract
- intent > consent (cannot truly consent if lied to about material fact)
- Whole reason for deal was misrepresentation
- Diff. between misrepresentation in torts where court needs carelessness
- For contracts prove:
  - Misrepresentation
  - Material
  - Relied upon
- Misrepresentation makes voidable if:
  - Induced promise via misrepresentation
- Reasonable to rely on the lie
- Restatement on Misrepresentation p.325
  - Fraudulent Misrepresentation if…
    - Promisor intends to induce assent & a,b, or c
      a. Knows/believes it isn’t true b/c of facts
      b. Is not confident it is true
      c. Has no basis for assertion
    - **Material** if likely to induce reasonable person to assent or likely to induce promisee to assent (required if fraud was unintentional- still fraud if material)
- 3 types of fraudulent misrepresentation
  - express statement (just an outright lie)
  - concealment (hiding the truth)
    - Restatement- concealment = to assertion (express statement) when…
      - Action intended or likely to prevent another party from learning a fact
    - nondisclosure (not mentioning an important fact)
    - Restatement- nondisclosure is = to assertion (express statement) when…
      - Knows disclosure is necessary to prevent previous assertion from becoming a misrepresentation
      - Knows disclosure would correct mistake on which the party is making the contract (failure to act in good faith)
      - Knows disclosure would correct mistake other party has as to contents of writing of the agreement
      - Where party is entitled to know b/c of trust/confidence b/w the parties
- Sarvis v. Vermont State College p326
  - Sarvis hides criminal record from employer (college)- college finds out and fires him
  - College contends avoidance of employment contract b/c fraudulent resume
  - Court Rules: resume fraud = **just cause** for dismissal
    - **Just cause:** conduct so egregious that an employer can discharge an employee despite employment contract- employee must have fair notice that such conduct would result in discharge
  - **Nondisclosure:** did not tell them about criminal record
  - **Concealment:** actively discouraged from seeking references
  - Clear intent ∴ no need for materiality
- In Re House of Drugs Inc. p.330- nondisclosure
  - Pharmacy in mall sues mall for fraud in lease during negotiations mall omitted info on two large stores going bankrupt and leaving soon
  - Elements of fraud (court treats materiality as element)
    - Material representation of fact
    - Defendant’s belief that the fact is false
    - Plaintiff’s reliance on the fact
    - Plaintiff’s reasonable reliance on representation
    - Plaintiff’s damages
  - Court Rules: no reliance ∴ no fraud
    - Pharmacy conducted independent investigation ∴ no **reliance** on leasor
      - Better inquiry would have uncovered the bankruptcies
    - **Haley: due diligence** distinguishes from Sarvis- pharmacy expected to find info on stores, College not expected to contract Franklin Peirce about prof.
    - Also, justice- mall owner acted normally, Sarvis acted corruptly
- Stambovsky v. Ackley p.333- nondisclosure
  - Contract to buy a haunted house- buyer wants rescission b/c of reputation
- **Doctrine of Caveat Emptor** - no duty upon vendor to disclose info. unless fiduciary
  - Fiduciary: special relationship creating duty to act for the other’s benefit
    - Ex. attorney-client employer-employee
- **Court Rules**: reputation of house = condition created by vendor that impairs the value of the property in a way that could not be discovered by buyer upon inspection \( \therefore \) seller took unfair advantage of buyer’s ignorance
- **Dissent**: under **Doctrine of Caveat Emptor** buyer must act prudently to assess value of purchase- did not prove fiduciary relationship or that vendor impaired inquiry
- **Haley**: **Due Diligence** - articles about ghost had been published, could have spoken w/ neighbors or a local real estate agent- the court ruled the buyer could not discover ghosts upon inspection- these cases turn on whether not the buyer could discover the problem
  - **Cummings v. HPG International** p. 338- misrepresenting fact, opinion, or future action
    - Cummings buys roofs from HPG w/ 10 yr warranty but oral promise from rep they would last 20 yrs and be good for cold winters
      - Roof shatters in cold after 10 yrs, but before 20
      - Cummings sues for cost of replacing
    - Discussion of fact vs. opinion
      - facts are actionable
      - opinions are not actionable b/c they are not reasonably relied upon
  - **Court Rules**: promise of 20 yrs was a fact, but did not prove rep knew about the defect
- **Negligent Misrepresentation** p.342
  - Careless – party making the misrepresentation failed to exercise reasonable care in obtaining or communicating information
  - Materiality more important for negligent misrepresentation
  - Many states allow negligence relief only if personal injury, not just economic loss
- **Fraud in the Factum** p.344
  - Fraud in the document being executed rather than an underlying fact for inducement
    - Ex. someone told the person the document being signed was something else
  - Restatment 163- party could not know the character/terms of the contract \( \therefore \) **void**
- **Misunderstanding**
  - Interpretation issues cannot be resolved- parties differ in subjective interpretation of terms
    - No basis on which to infer which interpretation is better
    - Parties use the same words, but unknowingly intend different meaning
  - If extreme, then requisite manifestation of mutual assent missing- **illusory**
  - In most cases, parties bear the consequences
    - More likely courts will interpret rather than saying no contract
- **Raffles v. Wichelhause** p.515
  - Ships “peerless” agreement to sell cotton arriving on ship named Peerless- two ships w/ that name arriving at different times- defendant refused to accept later shipment
  - **Court Rules**: no contract
    - Where parties have materially different meanings, and no reason to know of the misunderstanding, no contract results
    - Mutual assent to the same words is not necessarily mutual assent to k
- **Konic International v. Spokane Computer Services** p.515
Electrical device Konic questionably sold to Spokane—salesman said “fifty six twenty” meaning 5,620—Spokane took as 56.20—tried to give back—refused to pay

Failure in communication
recounts “Peerless Rule”

When misunderstanding doctrine applies…
  - when parties have different understandings of their expression of agreement
  - Does not apply if one party’s understanding, b/c of that party’s fault, is less reasonable than the other party’s
    - Both understandings must be reasonable—equally at fault
    - Parole evidence is admissible to establish facts necessary to apply the rule

Court Rules: no contract was ever formed
  - Diff. meanings to “fifty six twenty”

Mistake p.518
- Relates to party’s beliefs about the factual circumstances underlying the contract
  - One or both parties operating under a misapprehension of a material fact
  - Facts in existence at contract formation
  - Cannot be a mistaken judgment or prediction

Seeks to strike a balance b/w the party adversely affected by the mistake and the party adversely affected if no contract, but in most cases parties bear the consequences
  - Must be unfair to allocate the risk to the aggrieved party

Mutual Mistake
- Elements p.531
  - Mistake relates to facts in existence at contract formation
  - Shared by both parties
  - Basic assumption on which contract was made
  - Material effect on agreed performances
  - Complaining party did not bear the risk

Two common fact patterns
  - Both parties mistake something that goes to the nature of the item
    - Wood v. Boynton p519
      - Sold a stone to a jeweler, both believed it was topaz, actually uncut diamond
      - Court Rules: cannot rescind, mistake as to probably value
    - Sherwood v. Walker p.519
      - Sale of a barren cow—actually pregnant ∴ worth more
      - Court Rules: can rescind, mistake went to substance of the agreement
  
Restatement on Mutual Mistake
- Mutual mistake will be grounds for avoidance if…
  1. Facts in existence at contract formation
  2. Mistake shared by both parties
  3. Mistake of basic assumption on which contract was made
  4. Material effect on agreed exchange of performances
  5. Complaining party did not bear the risk

Disagreement over mistake in law could be mistake in judgment or fact
- Mattson v. Rachetto p.520
  - Sale of land w/ agricultural leaseback—leaseback was prohibited by law
  - Mistake of law—neither party knew the leaseback was illegal
  - Court Rules: no contract—restore parties to state before mistake

Mistake about worth of the item
Mistakes where the aggrieved party bore the risk
Restatement 154 a party bears the risk of a mistake when…
  o Risk is allocated by agreement
  o Aware of limited knowledge but considers it sufficient
  o Court allocates the risk

**Estate of Nelson v. Rice** p.525
  o Estate sale of 2 paintings – turn out to be by famous artist auctioned for 1.mil
  o Party bears the risk if they are aware of limited knowledge & perform anyway
    ▪ Hired appraisers but not a fine art appraiser ∴ bore the risk

**Dingeman v. Reffitt** p.527
  o lakefront property- cannot have sewage disposal according to Dept. of health ∴ cannot be developed/expensive to develop- buyer finds part suitable for septic system- sellers want rescission or fair market value
  o Court Rules: no rescission or reformation (fair market value)
  o mistake does not materially affect the performances of the parties
  o “as is” clause of contract shows intent that buyer would bear risks and benefits of present condition of the property

  o **Unilateral Mistake**
    ▪ Element differences b/w Mutual and Unilateral mistakesp.531
      • Only one party mistaken
      • Mistake relates to basic assumption on which mistaken party made the contract
      • Mistake has a material effect on performances adverse to the mistaken party
      • Effect of mistake particularly inequitable: either enforcement unconscionable OR the other party knew OR other party’s fault caused the mistake

    ▪ **Drennan v. Star Paving Note** p.531 Case p.286
      • Subcontractor bid that was too low- claimed mistake
      • If general contractor had reason to believe bid was error cannot reasonably rely
        o No reason to know it was a mistake
      • As between general contractor that reasonably relied, and subcontractor that who made the mistake bid- loss should fall on the party who caused it

    ▪ Where only one party is mistaken, it will take a strong showing of unconscionability or unfairness to relieve that party of the consequences of its own mistake (532)

  o **Relief for Mistake**
    ▪ **Avoidance**
    ▪ **Reformation**: changing contract to reflect the terms they actually agreed to
      • **Rancourt v. Verba** p.535
        o Land unsuitable for lakeshore development- seller knew buyer wanted to build house
        o TC “reformed” contract by allowing seller to pay damages for diff. in value
          ▪ Made as if they contracted for lower price
        o Court Rules: rescission
          ▪ Intent to purchase land for specific purpose (building lake home)

**Unconscionability** p. 381
  ▪ Where does it come from?
    • UCC and common law
    • Judge rules on it even though it is a fact driven issue
  ▪ How was the deal made?
    • Procedural Unconscionability
      o Flaw in bargaining process
        o Disparity of bargaining power
Hidden terms vs. clearly expressed

- Substantive Unconscionability
  - Problems with terms of agreement rather than bargaining process
  - “Oppressive terms”

Theory: Transaction so unfair that it would offend the conscience to enforce it
  - controversy over amount of discretion
  - “encourages court to react emotionally” p. 383

UCC-302 Unconscionable Contract or Clause & Restatement 208 agree
  - If clause is unconscionable, court (note: judge decides) may:
    1. not enforce k
    2. enforce k w/out clause (Severance)
    3. limit application of the clause (Rewriting)

Germantown v. Rawlinson Note p.383
  - fraud and duress, but also unconscionable to enforce note
  - unconscionability = no meaningful choice + unreasonable terms

Two components of Unconscionability
  1. procedural
    a. how the contract was bargained
      i. ex. bargaining tactics, disparity in power, etc.
  2. substantial
    a. whether as a result of unfair bargaining, one of the parties was able to impose an unfair contract or term

Adhesion: any contract in which one of the parties is able to dictate the terms of the contract on a take-it-or-leave-it basis, the other party has no choice but to accept terms
  - standardized forms can lead powerful corporations to take advantage of weaker parties
    o if terms are one-sided and unfair, weaker party has grounds for unconscionability b/c adhesion (no choice in terms) & disparity of power

NEC Technologies v. Nelson p. 387
  - TV catches fire and causes property damage- warranty covers set, but not consequential damages
  - Issue: is warranty clause precluding consequential damages unconscionable
    o Can normally limit consequential damages unless unconscionable (UCC)
    o If personal injury, automatically unconscionable, if economic maybe not
    o Court Rules: not unconscionable
    o Bargained over delivery and trade in, but didn’t try to bargain over warranty.
      - not unconscionable- accepted terms
        - Clause includes personal injury but UCC says it doesn’t invalidate the entire clause, only as to personal injury.
      - property part stands
  - unconscionable at time contract was made, not based on subsequent events

Unconscionability in Commercial Transactions- Rare
  - Southwest Pet Products Inc v. Koch Industries p.392
    - Purchased wheat w/ clause limiting remedy, tested it, turned it into dog food, dogs get sick- discover test was faulty & wheat actually had naturally occurring toxin
    - Co. wants $ for losses paid to dog food purchaser- remedy limit unconscionable
    - Focus on whether terms were oppressive
      - Terms were standard- they failed to read and negotiate
      - Both parties aware of possible toxin
      - Variety of sellers available & yrs of experience buying
    - Court Rules: not unconscionable

Remedies for unconscionability (like UCC and Restatement above)
(1) don’t enforce k (2) Severence- enforce w/out clause (3) Rewrite- limit clause to fix

**Brower v. Gateway** p.396
- PC purchase terms and conditions specify arbitration by ICC
- Procedurally ok to consider keeping the PC past 30 days acceptance
- Substantively unconscionable to have arbitration be prohibitively expensive
- Court Rules: substantive element alone can be sufficient to render unenforceable
  - Court applies rewriting remedy, remands to lower court to replace arbitrator

**Sosa v. Paulos** p.400
- Knee surgery complications- signed arbitration agreement
- Procedurally unconscionable b/c asked to sign right before surgery
- Substantively unconscionable b/c patient has to get award over 50% or has to pay all the costs for arbitration
- Severance clause- if any provision is invalid the others still stand
  - Court will not severe unconscionable parts b/c that would encourage parties to have unconscionable clauses b/c they would benefit or worst-case scenario not be harmed
  - Did not bargain for the severance clause

**Illegality**
- The contract itself harms societal interests
  - Things that are crimes
    - Ex. drug trade
  - Things that a statute or common law rule forbids w/out criminal sanction
    - Ex. license nontransferable
  - Cases so offensive to public policy the court will refuse to enforce
- Parties raise illegality as grounds for avoidance
- **Diversified Group v. Sahn** p.405
  - A has season tickets to Rangers and Knicks- nontransferable- sold for 90,000 above face value to B- B resold some to C at 140,000 above face value
  - Scalping is illegal- Madison Square Garden cancels the tickets
  - C gets refund of face value, but not 140,000- sues B
  - Illegality: violation of anti-scalping laws
  - Court Rules against B and C gets his money back
  - **In Pari Delicto Potior est conditio defendtis** or possidentis
    - The court will leave both parties where they found them b/c both = at fault
- **Danzig v. Danzig** p.407
  - Lawyer offers 1/3 of his fee from any client S brings in- turns in “billable hrs” for the 1/3- refuses to give 1/3 for one client S sues
  - Illegal contracts are not enforceable unless court decides parties are not *in pari delicto* – not equally culpable
    - Also consider public policy objectives
    - Won’t apply if defendant would unjustly enrich at expense of the plaintiff
  - Rules broken were for lawyers, not S ∴ lawyer more at fault
  - Court Rules against lawyer- for S getting 1/3
  - Dissent: should have been in pari delicto – S aided and abetted illegal act

**Contracts violating public policy**
- Not illegal but against public policy
- **Stevens v. Rooks Pitts & Poust** p.410
  - Partner at law firm signs agreement w/ noncompetition clause- if he withdraws owes back interest in firm - 4/5 he’ll be paid for- 1/5 only if he doesn’t compete
    - He takes a job w/ another Chicago firm- they refuse 1/5
- Noncompetition clause was against lawyer conduct code
- General practice firm ∴ any service rendered would be competition
- Deters good lawyers from serving the public after leaving
- “rule of reason” doesn’t restrict practice, just compensates firm for competition
  - Court Rules: against public policy- hinders lawyer’s practice and client’s choice
    - Will not use in pari delicto if against public policy ∴ firm must pay
  - Note on “rule of reason” p.413
    - Noncompetition clause may be upheld to the extent that it is reasonable in duration, geographic scope, and scope of the activity it restrains
    - Most common in sales of businesses, partnership agreements, and employment contracts (listed in order of court’s generosity- most deference to most scrutiny)
  - Harmon v. Mount Hood Meadows p.415
    - Enforcement of release in skiing season pass application in negligence action
      - π argues release was overbroad ∴ against public policy
      - determining application of public policy on “applied basis”
        - must demonstrate enforcement in particular case offends the public policy-
          no overpowering rule of policy that precludes enforcement in π’s case
      - Court Rules: not against public policy when applied to this particular case
        - Could if release for gross negligence and the case were gross negligence
  - Note: Surrogate Parenting Contracts p.418
    - Contract w/ 3rd party enables to have a child- $ for service + waiver of parental rights
    - Cases where surrogate mother wants to keep the child after contracting
      - In the matter of baby M ∴ surrogate mother basically kidnaps the baby
        - Court found the surrogate contract unenforceable
          - Amounted to baby-selling
          - Statute forbid payment for adoption
          - Against public policy for mother to agree before baby
      - R.R. v. M.H. tried to cure the problems from baby M, but failed
        - Paid in installments for “medical expenses,” etc.
        - Surrogate backed out
        - Court ruled adoption statute says consent ineffective until child is 4 days old

Consideration (Holmes calls consideration “reciprocal inducement” p.203)
- Gifts are not supported by consideration (but are effective once delivered/executed) p.195
- Congregation Kadimah Toras-Moshe v. Deleo p.195
  - Man orally promised synagogue 25,000 then dies- synagogue says they were going to use $ to build library commemorating
    - Court Rules: no consideration ∴ no contract
    - If no “benefit” or “detriment” to promisee then no consideration
      - Something must be given or recieved
    - Past consideration- Synagogue decided to build library after promise ∴ did not induce promise
    - Planning on money in budget was not detrimental reliance
    - Haley: synagogue lost b/c they couldn’t prove that he wanted the library (inducement) compared to Hamer v. Sidway where nephew had a letter verifying uncle’s intentions
    - Haley does not like the words “benefit” and “detriment” focus on bargaining

BarBri 4 step approach to consideration
- What is the promise in question?
Who made the promise? (defendant)
- Arguing there was not consideration

What was the promisor asking for in exchange for the promise?
- Will ask for one of the following?
  - Performance
  - Promise to Perform
  - Forbearance

  *Hamer v. Sidway* p. 197

  - Oral promise (w/witnesses) to pay nephew $5000 if he did not smoke, gamble, etc. until 21 uncle acknowledges in letter says he is holding w/ interest- uncle dies, nephew sues estate
  - Not smoking may benefit nephew, but benefit or detriment can satisfy consideration
  - *Forbearance*- waiver of legal right is sufficient consideration
  - Haley: wins b/c he could prove inducement w/ the letter, unlike *Deleo*, where the synagogue couldn’t prove inducement

Forbearance of claim according to Restatement p.223 (settlements)
- Forbearance to assert an invalid claim is not consideration unless:
  - The claim is uncertain as to the facts or law
  - Forbearing party believes it could be valid
- If bargained for writing, even though party doesn’t assert claim or believe it is valid

  *Fiege v. Boehm* p.223

  - Father of child promised to pay expenses & child support if mother did not file bastardy proceedings
  - Then discovers he is not the father - bastard claim invalid
  - Forbearance of bastardy proceedings valid consideration b/c believed he was the father & had intention to prosecute
  - He saw value in contract b/c began paying
  - When she filed bastardy proceeding later, it did not effect her claim for breach of contract b/c she had been discharged by his breach

Was the thing bargained for a detriment to the promisee or a benefit to the promisor?

  *Patel v. American Board of Psychiatry & Neurology* p. 200

  - Board okays MD student’s internship abroad then says he has to intern again
  - Detrimental reliance- wouldn’t have taken internship if it didn’t count
  - Court Rules: no consideration ∴ no contract (board wins)
    - Board said internship satisfied, but got no consideration in return for waiving that requirement- didn’t bargain for internship abroad
    - Misleading, but not binding as a unilateral contract

**Mutuality**

*Penn v. Ryan’s Family Steakhouse (Handout)*
Employee fired for complaining about harassment- employment contract has arbitration agreement, but with arbitration service rather than employer
(Judge Wood: arbitration services always biased b/c paid for by employers ∴ just not to enforce clause)
EDS (dispute service) side of the promise was not specific enough
- No rules in contract
- Rule book gives them discretion to change the rules

Court Rules: Never truly bound b/c they had discretion ∴ no detriment ∴ illusory promise ∴ no contract
Illusory promise: one which by its terms makes performance optional
“Mutuality of obligation”: both parties must give something of legal value to get something in exchange.

\[ \therefore \] if either party has not contributed or promised to contribute something meaningful then no contract

If either promise cannot serve as *consideration* for the other, then no contract

- *Hamer v. Sidway*: arguably no contract b/c at no point in time were both parties obligated
- Nephew had to forbear until 21, uncle didn’t have to pay until 21, then uncle had to pay but nephew no longer had to forbear
- *Apfel v. Prudential-Bache Securities*: burdens needs not be =

Trend to enforce serious/reasonably made promises even if mutuality of obligation is lacking

3 types of situations where a party’s obligation might be *illusory*

1. **Performance as Consideration** - a party simply performs but never obligates itself to do anything

   - Ex. carbolic smokeball- customer had no obligation to get the flu, but performance was still acceptable consideration under the unilateral contract
     - Employee sues for breach of personnel handbook- won’t fire w/out “just cause”
     - **At-will-employment**- handbook modifies- they’ll try to fix problem before firing
     - Forfeited benefits at other job for job security promised in handbook
       - Induced his promise & he detrimentally relied
     - Court Rules: employee did not have to sacrifice his “at-will” right for mutuality
       - Mutuality does not require reciprocity just a mutual obligation
       - His performance- working for them- was valid consideration

2. **Conditional Promises as Consideration** - promise under condition- only obligated if condition

   - Unless the condition comes to pass, the promise does not become enforceable
   - If parties know the condition cannot occur then illusory promise \( \therefore \) no contract
   - If conditional event is uncertain, then risk = legal detriment \( \therefore \) consideration \( \therefore \) contract
     - *Iacono v. Lyons* p. 233
       - Trip to vegas, promise to split winnings- one wins but refuses to split
       - Court Rules: exchange of conditional promises satisfies consideration
         - She assumed the risk (detriment) of splitting if she had won

3. **Discretionary Promises as Consideration** - one party’s performance is left to his own discretion

   - Duty to act in good faith
   - promise based on party’s discretion, but their judgment is bound by good faith \( \therefore \) adequate consideration
     - Fashion designer hired W w/ exclusive rights to endorse in her name- split profits 50/50 on endorsements
     - Designer endorsed things w/out him and kept the profits
     - W’s discretionary promise to give 50% of his endorsement profits
       - Discretionary b/c profits only if he works and gets endorsements
       - II says no obligation to get endorsements \( \therefore \) no consideration
     - Court Rules: good faith requirement that he would work \( \therefore \) consideration

**Sufficient (adequacy of) Consideration**

- Freedom to contract means freedom to make a bad deal (213)
  - Consideration is not necessarily an even exchange
  - Should not be “de minimus” p. 217
    - Courts will rule token exchanged “sham” or “nominal” \( \therefore \) not sufficient consideration b/c it’s not believable that it would have been bargained for
Ex. if synagogue had given a plastic dreidel for the $25,000 in Deleo still no consideration because it’s a token sham exchange

Has to cross a “mysterious” line to not be a gift anymore

*Apfel v. Prudential-Bache Securities, Inc.* p213
- Bank agreed to pay for idea- trade secret computer program for issuing & selling bonds- payment based on use for X years- paid for 2 then secret became public and bank stopped paying
- Bank argues no longer valuable if no longer novel : no consideration
- Court Rules: regardless of novelty, the system itself has value : it’s consideration
  - bank’s use proves value &
  - extensive negotiation before contract
  - sucks that bank still has to pay for something publicly available, but they benefited from having it first and just made a bad deal for the long-term

*Batsakis v. Demotsis* p.215
- Greece was invaded and conquered by Germans- D needs $ to get out- loan- issue over amounts with conversion- D thinks loan amount worth less than his promise
- Even if unequal “mere inadequacy of consideration will not void a contract” (217)
- Regardless of the exchange comparison in value- if it’s enough to induce return promise then it’s valid consideration

3 situations where consideration could be inadequate

*Past Consideration*- things that happened before the contract cannot be consideration
  - *Carlisle v. T&R Excavating, Inc.* p.206
    - Married couple wife does book-keeping- Promise to do excavation work for wife at cost (materials no labor charge)
    - Divorce - work stops- wife sues for cost of hiring 2nd co.
    - Court Rules: No consideration b/c conditional gratuitous promise (gift w/ condition for material cost) : no contract
      - Reimbursing material costs is not a benefit
      - Business transactions are mutually beneficial
        - Commercial transactions generally have clear cut consideration, it’s personal transactions where things could be a gift that consideration has a gray area (p.212) ex. *Hamer v. Sidway*
    - Past consideration- couldn’t be work for book-keeping b/c she was book-keeping before the promise- no inducement

*Preexisting Duty*- was the consideration a **new** benefit or detriment?
  - *State v. Avis* p.219
    - Man shot and killed in robbery- governor offers $20,000 reward for info leading to arrest- private eye for co-defendant gets a confession
    - Court Rules: no pre-existing duty : contract
      - No constant duty like police officers
      - No duty w/in employment to testify etc.
      - No pre-existing duty to promisor (the government) b/c private eye

*Part payment* on a debt
  - A creditor promises to release part of the claim- pay me part and I will forgive the remaining debt
• Part payment of a debt that is due and undisputed is not consideration for a release.

Substitutions for Consideration

Promissory Estoppel

- New law and American law- varies from jurisdiction to jurisdiction
  - If jurisdiction treats as separate theory of recovery then may be subject to rules from other areas of law- ex. Gilmore says Tort law b/c recovery for harm
- Protects a promisee who has reasonably & detrimentally relied on a promise, when consideration is otherwise missing
- Detrimental reliance- promisee could expend resources or forgo opportunities ∴ worse position than if promise had never been made
- Promisor estopped from arguing no consideration b/c promisee detrimentally relied
- Remedies: limited as justice requires according to restatement- discretion
  o Usually only expectation damages if they find a contract- reliance damages for promissory estoppel to reimburse back to position before he acted on the promise
- Restatement on Promissory estoppel
  o Promisor should reasonably expect promise to induce action or forbearance
    - Clear and definite
  o Which does induce action or forbearance
  o Binding if injustice avoided only by enforcement of the promise
    - Remedy limited as justice requires
  o Exception for charitable or marriage settlement
    - binding w/out proof of action or forbearance
- Deli v. University of Minnesota p.246
  o Breach of oral promise not to watch coach’s homemade porn on same tape as university’s gymnastic team performance
  o The only way to get emotional damages would be to prove independent tort

- Promissory Estoppel in Non-Commercial
  - Kirksey v. Kirksey p.248
    o Brother-in-law offers sister-in-law house to raise her family after brother dies
    o She moves then after a few years he kicks her out
    o Court Rules: no recovery b/c didn’t bargain for her to move, but judges dissent
  - Ricketts v. Scothorn p.249
    o Grandfather gives granddaughter $2000 promissory note and tells her not to work
    o Grandfather dies w/out paying and she claims against the estate
    o Court Rules: promissory estoppel for consideration- detrimental reliance in quitting job – charitable element- inequitable to permit to resist payment
  - Wright v. Newman p.250
    o Mother sues for child support- man not the real father but on birth certificate
    o Court Rules: promissory estoppel ∴ contract
      ▪ On birth certificate and treated like his son ∴ promise to support
      ▪ Detrimentally relied b/c she did not seek out natural father
      ▪ Injustice unless he pays child support
    o Judge dissent saying she can find the natural father now

- Promissory Estoppel with Charity
  - Allegheny College v. National Chautauqua County Bank p.252
    o Charitable pledge of 5,000 to college- executor refuses to pay
Cardozo opinion accepting first 1,000 w/ obligation to commemorate = consideration
Cardozo discusses promissory estoppel in opinion
  Haley says “dual structure” to win on both sides of promise??

In Re Morton Shoe Co. p. 255
Co. agrees 10,000/yr donation to Jewish philanthropy org. – skips 2 yrs.
  CJP borrows from banks based on amount pledged
  Court Rules: 2 ways to enforce charitable subscriptions
  1. Traditional- agreement to appropriate funds = consideration
  2. Promissory Estoppel- reliance on promise subs in for consideration
  Court remarks- shouldn’t need reliance for charity- mentions Restatement

Promissory Estoppel in Commercial Context
  Harsher standard- greater scrutiny
  Reliance on gratuitous promises in the business world is unreasonable

Commercial Promises
  East Providence Credit Union v. Geremia p. 260
  Borrows $ w/ car as security and clause requiring insurance stipulating if they couldn’t pay the premium then credit union would and would tack onto loan
  Insurance payment overdue- couple says renew for us- credit union doesn’t
  Car totaled w/ no insurance b/c premium never paid- credit union wants $ anyway
  Court Rules: 2 approaches
  Consideration: promise for a promise- credit union promised to pay premium in exchange for premium + interest later .: valid consideration
  Promissory Estoppel: detrimental reliance by promisee b/c they did not pay premium believing the credit union would
  They use promissory estoppel but make the point that traditional consideration doctrine supports the decision too
  Ypsilanti v. General Motors p.264
  GM gets tax abatements from county for new projects (encouraging for new jobs)
  GM decides to relocate models to TX
  Court Rules: No promise
  Trial Court found promissory estoppel based on statements of manager
  Appellant applies diff. standard and finds reliance was unreasonable
  Seems like the court just didn’t want to find a promise

Employment Disputes
  Two scenarios
  Promises made pre-hiring
  Forgoing other oppurunities then getting fired
  Most courts hold employment-at-will
  Expenses preparing to take a job are generally not recoverable, just like training expenses for employers- both parties take the risk
  Lord v. Souder p.268
  Good employee fired for being a whistle-blower
  Oral promise she would be protected- At-will-employment means she can be fired, unfair
  Court Rules: promissory estoppel (Haley: riding in on white horse)
  Dissent: treat oral promise as modification of at-will-employment- same result
  Promissory Estoppel can also get around the statute of frauds p.273
  Court should focus on employer’s fraudulent conduct in doing this

Commercial Negotiations
  Might not get full enforcement of the contract, but courts can at least reimburse for reliance
  Hoffman v. Red Owl Stores p.275
  Bakery owner wants grocery franchise (not in book but dealt w/ unauthorized agent)
Told if they had $18,000 and did x,y,z then franchise then kept upping price
  - After 2 yrs they finally cut off negotiations
Detrimental reliance: small grocery for experience sold at a loss, sold bakery, deposit for land for grocery location, relocated family
Never reached full agreement for court to enforce as the promise
Generous application of promissory estoppel
Haley: the courts could be applying good faith standard to Red Owl

Gruen Industries v. Biller p.276
- Co. makes oral agreement to buy shares from stockholders, then 2nd co. offers stockholders more money so they sell to them instead
  - Court Rules: no contract
    - Statute of frauds (but now doesn’t apply to stock anymore)
    - Unreasonably to rely on promise: no promissory estoppel
      - Unreasonable b/c this type of agreement usually needs writing
Haley: In Red Owl, Hoffman was new to the business so court protects
Here businessmen, so court applies stricter standard

Barbri 6 step approach to Promissory Estoppel
  - What is the promise in question?
  - Who is the promisor/promisee?
  - What the promisee (plaintiff) do after the promise was made?
  - Was this thing, action or inaction, induced or caused by promise?
    - Haber v. Soulard
  - Should the promisor have anticipated the promisee’s action?
  - Whether the foreseeable action in reliance on the promise makes it unjust not to enforce the promise? (can injustice only be avoided by enforcement of the promise)

Unjust Enrichment and Material Benefit p.297
- Moses v. Macferlan (Handout)
  - Moses signs promissory notes to Macferlan
    - Old English case establishing restitution
    - Recover $ unfairly received
Unjust enrichment like promissory estoppel is not based on a contract- alternative theory
  - Cause of action where benefit conferred: unjust for recipient to keep benefit w/out paying
    - Ex. keeping $5000 down payment on a house that was never sold = unjust enrichment
  - Also cases to restore benefit conferred under circumstances that never gave rise to a contract
    - Ex. emergency medical care- no contract but patient unjustly enriched: owes $
2 elements of unjust enrichment
1. must be enriched
  - Remedy: Restitution = return of benefit or money judgment for its value
    - when judging money value of enrichment for restitution… (300)
      - i. quantum meruit = market value of service
      - ii. quantum valebant = market value of goods
2. must be unjust to keep w/out compensating
  - cannot be gratuitous benefit
  - if benefit provided without being asked and cannot be given back, not unjust
    - then giver is “officious intermeddler”
    - if it is property that can be given back then maybe unjust
      - ex. given item, upon knowing it wasn’t a gift, still kept item: acceptance
• if contract can be found, then no need for unjust enrichment
  o *Martin v. Little Brown & Co.* p. 301
    ▪ Reader notifies publisher of plagiarism, sends “proof” (book w/markings) then demands compensation - co. offers $200, he sues for 1/3 of the recovery from the copyright suit
    ▪ General Rule: knowledge and approval of beneficiary are enough to imply contract & promise to pay if it is not gratuitous
    ▪ Reader volunteered information, volunteers have no right to restitution ∴ no unjust enrichment
  o *Feingold v. Pucello* p. 305
    ▪ Car accident- lawyer begins work on case then contingency fee is so high that client refuses service & tells the lawyer to keep his research (pics, confession, etc.) lawyer sues
    ▪ Client did not keep the research ∴ lawyer did not “enrich” the client ∴ no unjust enrichment
  o Volunteers and Intermeddlers
    ▪ *Estate of Cleveland v. Gordon* p. 307
      ▪ Niece wants medical expenses from taking care of her aunt reimbursed from her estate
      ▪ Aunt never agreed to reimburse, administrator says it was gratuitous
      ▪ Used her own $ to pay most of her aunt’s bills
        • A person who pays another person’s debt out of moral obligation is not an officious intermeddler & is entitled to reimbursement unless payment was gratuitous
        • Sometimes moral obligation to support family is considered gratuitous, but not always
      ▪ Aunt knew niece expected reimbursement and accepted care ∴ not gratuitous ∴ restitution

**Moral Obligation** p. 310
  o Past consideration cannot be consideration for the promise, but moral obligation compels court to enforce compensation for previous performance
  o Past consideration exception – prior detriment treated as consideration b/c of moral obligation
  o Clear link to restitution and theory of liability
  o Restatement 86 on Benefits Received
    ▪ Promise made in recognition of previous benefit binding to prevent injustice
    ▪ NOT binding (1) if gift, (2) no unjust enrichment, (3) or disproportionate value
  o 3 circumstances
    1. benefit conferred on promisee before promise
    2. unjustly enriched promisor
    3. promisor made promisee pay for benefit
  o 2 cases
    1. ratifying preexisting legal obligation (enforceable)
      ▪ ex. debt statute of limitations ran to enforce contract then debtor acknowledges and agrees to pay in a letter- the letter can be enforced w/out new consideration or reliance
      ▪ 2 most common situations
        1. debt discharged by bankruptcy
          a. if debtor acknowledges/agrees to pay enforce w/out new consideration
        2. previous debt voidable
          a. assent voidable b/c of fraud, mistake, incapacity, etc.
          b. if party ratifies later, then enforceable
            i. ex. minor promises, then ratifies once age of majority
    2. compensation for a previous material benefit (more controversial- less widely accepted)
  o *Webb v. McGowin* p. 313
    o Badly crippled saving a man from a pine block, man agrees to support w/ $15 every 2 weeks
    o Once man dies, estate refuses
    o Court Rules: rescue = material benefit- agreed to compensate after creating moral obligation
      ▪ Moral obligation allows previous act of rescue to count as consideration for promise
Demantis v. Estate of Tallas p.318
- Young man helps older man, man dictates memo saying he intends to change his will to leave 50,000 for compensation for the care - dies before changing will
  - Claims moral obligation should allow b/c care is unjust enrichment & memo promises
- Court Rules: unclear what services were performed, unclear of value, considers gratuitous
- Barbi: UCC & Restatement 89- good faith modification of contract

Statute of Frauds p.175
- No general rule requiring writing
- For certain kinds of agreements, writing is required
  - Sale of goods over $500 (UCC article 2 always applies to sales of goods, but special rules if merchants)
  - Performance not capable of being performed within a year
    - Ex. hired w/ 2 year employment contract
  - Real Estate sales (transfers of interests in real estate)
    - Must have term of duration over 1 year
  - situations “within the statute of frauds” - just means statute applies
- Satisfying the Statute of Frauds for those situations
  - Requirements of Writing
    - Identifies parties
    - Identifies what each agreed to do
      - Can be informal & can be accumulation of communications
  - Content
    - Affirms existence of contract
    - Must have “all material terms”
    - If sale of goods, needs quantity
  - Signature
    - Common Law- must be signed by the defendant
    - In UCC-2-201, if sale of goods over $500 and merchants then only need plaintiff’s signature
      - The “answer the damn letter” exception- if you don’t answer in 10 days after receipt, that satisfies
- C.R. Klewin Inc. v. Flagship Properties Inc p.180
  - Weird procedure- feds sent back to CT supreme court- Justice Peters! Haley <3 Peters!
  - Construction project, K was hired by F to manage the project then replaced
    - Only the first phase was in writing
    - Project was to take 3-10 yrs, therefore statute of frauds applies
    - Peters applies narrowly, even though project was expected to take over a year the express terms of the agreement did not require it to
      - If no specific duration over a year in express terms, then contract of indefinite duration - statute of frauds does not apply
      - K gets by with oral contract, but that’s just getting past summary judgment, still has to prove terms at trial
- The Part Performance exception to the Statute of Frauds
  - Part performance, conduct following an oral agreement, may provide enough proof of contract enough to dispense with need for writing
- Burns v. McCormick p.185
  - Oral contract w/ π for care (old man w/out family) in exchange for estate
  - Conduct of π was itself a “symptom of a promise”
• Performance, (moving, working w/out pay, etc.) can provide proof of promise, but not proof of reward
  - Π loses because the court cannot infer that the old man promised his estate
• need writing for the land transfer
  - *Nashan v. Nashan* p.186
    - Father in law oral contract for ½ of family business and house to get daughter and husband back in Sante Fe, they move, son-in-law works for co., improves house, etc. then 20 yrs later, divorce
    - Remanded to see if exception for part performance applies (b/c of move, etc.)

• Exceptions Under UCC p.189
  - Merchants must give notice w/in 10 days of receipt of signature requirement waived
  - Special goods specific to buyer (enforceable w/out writing)
  - Admission of contract (enforceable up to admitted amount)
  - Goods have been paid for, received, and accepted

Exactly what is the deal (promise)? What was agreed to?

**Contract Interpretation and Construction**
- Parties disagree over nature and extent of their respective obligations

  **Interpretation:** process of discerning the meaning intended by the parties (objective intent)
- Focus of inquiry = reasonable expectations that words and conduct would engender in context

  **Construction:** adding contract terms by legal implication (what is fair or best for public policy)
  - Courts will add terms that seem fairly intended though not clearly expressed

- *Guilford Transportation Industries v. Public Utilities Commission* p.443
  - License agreement to run cable - but does “wires” cover fiber optic cable?
  - License requires G to accept appurtenances unless interferes w/ RR
  - If term is unambiguous then interpretation as matter of law
  - If term is ambiguous then fact finder :: remand
  - Court looked at the meaning of the word (dictionary, custom, etc) then to the remainder of the contract to try to interpret (allowing 0 volts, not explicitly excluded etc.)

- Restatement and UCC guidelines for interpretation p.447-8
  - Restatement Rules to aid interpretation
    - Context
    - Interpret writing as a whole
    - Unless evidence of diff. intention or technical term, should apply prevailing meaning
    - Prior dealings- give great weight to performance accepted w/out objection
    - Consistent manifestations of intent relevant to performance, dealing, trade usage
  - Restatement Standards of Preference in Interpretation
    - Interpretation which gives reasonable lawful effective meaning to all terms
    - Express terms over course of performance, course of performance over course of dealings, course of dealings over trade usage
    - Specific or exact terms over general language
    - Separately negotiated or added terms over standard terms
  - UCC gives more detail on course of performance, course of dealings, and trade usage
  - UCC has same hierarchy of evidence as Restatement
    - UCC 1-205 Course of Dealing and Usage of Trade
      - Course of dealing def. (self explanatory)
      - Usage of trade def. (self explanatory) must be proven as fact
        - If using trade code, interpretation of code for courts
      - Must give other party notice about trade usage evidence
- *Frigaliment Importing Co. v. BNS International Sales Corp.* p. 449
  - “chicken” – young suitable for frying or can stewing chicken satisfy too
    - *π burden to prove narrower young definition*
  - b/c small can only be young, all should be young
    - ex. contract for applies in 2 sizes can be satisfied by diff. types of apples even if
      only one type comes in both sizes
  - issue w/ German translation – German word for chicken included both types
  - Trade usage argument that chicken means young chicken
    - *Not enough evidence of usage*
  - Price was low for young chickens
  - Court Rules: broader def. allowing stewing and frying applies

- *Atwater Creamery co. v. Western Mutual Insurance Co.* p.455
  - Losses from burglary- issue over whether type of burglary is covered by insurance policy
  - “evidence of forcible entry” requirement – insurance claims no physical damage to prove
  - Court Rules: definition in policy unambiguous, but won’t enforce against *reasonable expectations* of policy holder
  - two previous burglaries- course of dealings
  - no one purchasing burglary insurance would expect it to exclude skilled burglaries that
don’t leave damage
    - doctrine of protecting the *reasonable expectations* of the insured
      - burden on insurance co. to communicate coverage
    - doctrine of contracts of *adhesion*

**Parol Evidence Rule**
- Parole Evidence: evidence other than the written contract
- Rule excludes evidence of agreements made prior to the writing
- Judge decides what gets excluded
- Integrated agreement
  - Written – final and complete
  - Complete integration v. Partial integration
    - Complete integration- writing that is final and complete
    - Partial Integration-written and final as to what it covers, but may not be complete may
      not cover everything

**Rules for Parol Evidence** p.481
- If you have an integrated agreement, parole evidence cannot contradict the agreement
- If partial integration, additional terms can be admitted (still cannot contradict agreement)
- Even if complete, parole evidence can be used to clarify ambiguous terms (still can’t contradict)

Most persuasive to least persuasive evidence
- Course of Performance: What these people have previously done under this deal
- Course of Dealing: What these people have done within similar deals
- Custom and Usage: What different people have done under similar deals

*Mitchell v. Lath* p.483- buyer expected removal of icehouse- intent based parole evidence
- Court rules: parties did not intend “complete” if it omitted the icehouse agreement
- Williston Four corners approach gives way to Corbin contextual approach
  - If parole evidence seems credible, judges are less likely to say it was integrated

*Masterson v. Sine* p.485
- Option contract to sell house
Pacific Gas & Electric Co. v. G.W. Thomas p.490
- defendant agrees to work on steam turbine and insure for property damage
- issue over whether coverage was for 3rd parties or 3rd parties + π
- four corners would say contracts aren’t the intent of the parties but “magic words”
  - Roth v. Malson dissent “magic words” acceptance on wrong line still intent
- Sense in which writers intended the words matters more than words themselves
  - Parties understanding of the words may differ from judge’s understanding
  - If two interpretations, then extrinsic evidence admissible
- Court Rules: should have admitted parole evidence to determine coverage was not for π

UCC
UCC 2-202 Final Written Expression- Parole or Extrinsic Evidence p.496
- contextual approach to admission of course of dealings, usage in trade, course of performance

Merger Clause p.499
- Clause stating that the document is the complete deal to get parole evidence protection
- Given great weight unless disparity in power suggests merger was in bad faith
- Bristow v. Drake St. p.499
  - Playwright fires associate producer- she claims sex discrimination & breach
  - Employment contract for two years w/ merger- employer can only fire for criminal act
  - Issue: could he fire b/c show closed?
  - Court rules: could not fire based on four corners interpretation
    - Trade usage evidence might have been admissible but not presented
- Note on UAW-GM Human Resources Center v. KSL Recreation Corp. p.502
  - Union makes contract for convention specifying union workers- contract doesn’t mention union requirement but has merger clause and cancellation gives hotel liquidated damages management changes, no more union staff- union cancels contract and wants deposit
  - Hotel refuses deposit b/c of liquidated damages
  - Issue: merger clause effect on parole evidence that they wanted union staff
  - Court Rules: merger clause excludes parole evidence

Exceptions p.506
- Extrinsic evidence that demonstrates the contract is void or voidable is admissible
  - Ex. misrepresentation, duress, etc
  - Was it reckless of party to trust the writing? Failure to read? Who was at fault?
  - Even w/ fraud still hard to get out of merger clause
- Sound Techniques Inc v Hoffman p.507
  - Does merger clause stand if negligent misrepresentation?
  - Real estate agent assures recording studio that space above bar would meet their needs
  - Acoustic inspection, but not on weekend night
  - Court Rules: merger clause is not protection against fraud, but is against negligent fraud
    - Valid w/ fraud b/c:
      - Harm done to party regardless of whether fraud was intentional
      - Parole evidence rule does not apply to tort negligence
      - Good faith in business dealings and material fact
    - Invalid w/ negligence- those policy objectives don’t apply & freedom to contract

Gap Fillers- things courts imply into contracts
- There are gaps in what was written that you’re trying to fill
  - Implied duty of good faith
    - Wood v. Lucy Lady-Duff Gordon
• Designer with exclusivity agreement with agent
• Court implied obligation for reasonable efforts

• UCC
  • Good faith obligation implied throughout UCC- UCC applies good faith requirement
  • Implied warranty of merchantability
    ▪ Merchant of that kind sells something that turns out to be defective
    ▪ Ex. case with book publisher and printer – printer did poor job

Did anyone fail to do what he agreed to do?
Yes.
If everyone did what they had agreed to do then there wouldn’t be a dispute… just be sure to point out the failure.

If someone failed, is there a legally recognized excuse?
1. Performance Was Conditional- Party Failed To Meet Condition
   Conditions
     ▪ Restatement definition: an event not certain to occur, which must occur before performance under a contract becomes due” (559)
     ▪ Koch v. Construction Tech p.567
       o Subcontract for painting- condition precedent- “pay when paid” clause- no pay until payments received by general contractor - general contractor never paid in full, doesn’t pay subcontractor in full- argues it was a condition precedent
       o Court Rules: no condition- clause to affect timing not obligation to pay
     ▪ General Rule: express conditions must be complied with – courts will strictly enforce
       ▪ More discretion with implied or construed
       o Sublease for office space- conditions for L’s consent- Subleasor didn’t get L’s consent in writing for “tenant work” (phone system)- eventually obtained but post-deadline
       o Substantial compliance is sufficient for implied & construed conditions, but exact compliance necessary for express conditions
         ▪ Had lawyer call at the deadline to notify of L’s consent ∴ substantial compliance, but not enough for an express condition
     ▪ Jacobs and Young v. Kent p.573
       o Wanted house built with specific pipe- substituted equivalent made in different factory- changing the pipe would require demolition of walls
         ▪ Court Rules: it was not an express condition (express conditions must be strictly complied with this substitution was okay)
         ▪ Owed difference in value (nominal or nothing) not cost of replacing
         ▪ Dissent: right to contract for what he wanted ∴ doesn’t have to pay balance
     ▪ Functions conditions may serve
       1. Allow a party to escape k if specific event occurs or fails to occur
         ▪ Escape under defined circumstances that make k undesirable
           ▪ Ex. real estate purchases conditioned on obtaining a loan at X rate
             o Escape not absolute b/c of good faith- promise of effort
         ▪ Pure condition: fulfillment or non-fulfillment beyond control of the parties
           ▪ Merritt Hill Vineyards v. Windy Heights Vineyard Inc. p.580
             ▪ Sale of majority stock interest in vineyard- seller shall retain deposit unless seller failed to satisfy conditions requiring title insurance &
confirmation that sale did not default mortgage- seller doesn’t get policy or confirmation- buyer wants out & deposit & damages
  o Right to consequential damages if it were a promise, but not for a condition- no breach ∴ no liability for damages – only deposit

  *Fry v. George Elkins Co.* p.581
  - Sale of house w/ condition buyer obtains loan 20,000 at 5% for 20 yrs
  - Buyer wants out b/c he couldn’t obtain a loan even though Realtor and sellers find a lender (really just wants out)
  - Recovers deposit less damages for seller
    o Buyer had implied good faith obligation ∴ seller gets damages

2. Allow party to exercise judgment by making performance contingent on satisfaction
   - Party’s desire for the contract is dependent upon satisfaction w/ the outcome of some uncertain event
   - If party retains unlimited discretion to decide whether to perform then no commitment ∴ illusory promise
   - Necessary to determine how satisfaction will be measured
     - Subjective good faith vs. objective reasonableness
     - Subjective good faith if matters of taste or artistic judgment
     - Objective reasonableness if matters of technical or commercial nature

  *Incomm Inc. v. ThermoSpa* p.584
   - Court refused to imply a subjective good faith condition of satisfaction in a contract for the production of an advertising brochure
   - Contained no express condition of satisfaction, full collaboration b/w them, then ThermoSpa disliked end product
   - Sued Thermo-Spa for price of labor and materials up to termination
   - Advertisers could have expressly agreed to satisfaction condition, but cannot be inferred that it was subject to individual taste- too risky
     o Could imply “reasonable satisfaction,” but b/c brochure was not deficient by objective standards Thermo-Spa would still lose
   - If commercial context, courts apply reasonable standard to satisfaction

3. Alternative performances, if condition then X if not then Y
   - Use of condition to structure contract so that if the condition is satisfied, the party renders one performance, if not, party must render another
   - If storage then 1,000/month if commercial space then 1,500/month

4. Sequencing performances by making one performance a condition of the other
   - Concurrent conditions: promises are dependent on each other & must be performed at the same time
   - If the contract is silent on sequence, courts will construe as concurrent
   - If one performance is instantaneous and the other longer, the instantaneous performance will be construed to come first

Excuse of Conditions

1. 4 situations in which courts will excuse a condition even though it was legitimately and expressly agreed to by the parties
   - waiver
   - estoppel
   - obstructive or uncooperative conduct
     - party’s behavior forfeits the right to hold the other to the condition
   - unfair forfeiture- based on courts discretionary power- more controversial

2. Waiver and Estoppel
- Waiver of condition: beneficiary manifests intention that he will not require the condition for performance. \( \therefore \) condition waived
  - Voluntary abandonment of the right
  - Express or by implication from words and conduct
  - One-sided relinquishment of a right. \( \therefore \) no consideration
    - If material, can only be abandoned as modification with consideration
  - Does not require reasonable reliance and detriment
- Estoppel of condition: beneficiary of a condition indicated by words or conduct that he will perform contingent promise despite non-fulfillment
  - Must know or have reason to know the other party would rely to their detriment
  - Party may be estopped based on careless action that was not deliberately intended to give up a right
- If the words or conduct abandon a nonmaterial condition – waiver
- If the condition is material, estoppel can be established via reasonable detrimental reliance
  - Mercedes Benz Credit Corp. Morgan p.592
    - Repossession of Porsche following default of buyer
    - Because dealer repeatedly accepted late payments they had waived their right to repossess for a late payment
    - In order to regain right, had to give buyer notice
  - Gould v. Artisoft p.593
    - Employment contract- required to sign nondisclosure and non-competition agreement, but they forgot to enclose it and never gave it to him
    - Artisoft waived the condition by failing to give him the agreement
3. Obstructive or Uncooperative conduct
- Obligation not to do anything that would obstruct the contract occurrence
  - Sometimes express, but usually implicit in good faith and fair dealing
  - If promisor prevents fulfillment of a condition, that condition is excused
    - Ex. Gould employee never given agreement to sign- could be hindrance of condition. \( \therefore \) excused (instead of waiver of condition)
  - Sullivan v. Bullock p. 595
    - Contract to remodel rooms- owner prevented complete performance- did not want workers in home in her absence- one of the workmen entered while she was out so she didn’t allow them back inside to finish
    - Breached by preventing contractor’s performance
    - Damages: expectation damages = the balance of the k price – savings resulting from breach
4. Unfair Forfeiture
- Court’s determination that enforcement of the condition would result in undue and unfair hardship to the party to whom performance is due
- The condition will allow the promisor to benefit from a technicality that will deprive the promisee of valuable rights and give the promisor a windfall
- Uncommon- courts will only do so where equity overwhelmingly demands
  - J.N.A. Realty Corp. v. Cross Bay Chelsea p.598
    - Leased restaurant- option to renew for ten-year term- must notify L in writing by certified mail 6 months in advance – modification contract to
extend from 10 to 24 yrs - J.N.A notified that option had lapsed – had to vacate - restaurant send renewal in response, but L rejected

- Restaurant made improvements & would lose investment
- Remanded on issue of whether L acted in good faith reliance that restaurant did not intend to renew when they relet the space
- Dissent: terms were clear, should not aid where party carelessly lost value

2. Breach by the other party

**Material Breach and Substantial Performance**

- Material and Total Breach: breach so serious it discharges other party, terminates k, and allows expectation damages
  - Painter paints house purple
- Partial Breach: less breach
- Substantial Performance: performance by breaching party, falls short of contract requirements
  - Painter using a similar color by a diff. brand instead of paint specified in k
- Determining whether a failure is material p.605
  - Extent to which the injured party would be deprived if benefit they reasonably expected
  - Extent to which injured party can be adequately compensated for the part deprived of
  - Extend to which party failing to perform or to offer to perform will suffer forfeiture
  - Likelihood that the party failing to perform will cure (totality of circumstances)
  - Extent to which party failing to perform comports w/ standards of good faith

**Seydel v. Ige** p.604
- Macadamia nut candy co. hired master chef - never gives him promised co. stock
- Material breach withheld service then can sue for total breach

**Worcester heritage society v. Trussell** p.607
- Bought house from historical society w/ agreement to restore, slow restoring so society sues for rescission
- Self-help remedy in contract - society could hire workers to complete and charge Trussel for their work
- Delay, but contract expressly contemplated possibility of delay, & buyer put work into house
- No express condition to rescind, only to restore themselves if he didn’t . cannot rescind
- If there were condition to rescind & they did not exercise at the 1 yr. mark right would have been waived (1 yr from condition for time he had to restore exterior by)

**Lyon v. Belosky Construction** p.609
- Construction of custom home - mistake in roof proportions enlarged overhang so pillars could not be used
- Unintentional breach & substantial performance in good faith
  - Damages would be value of the property as constructed vs. value if properly completed - damages to redo roof could be economic waste
  - Not economic waste b/c didn’t get the benefit of their bargain (custom home)
  - Construction co. acted negligently in failing to detect the problem

**Recovery of the Breaching Party**
- If material breach, no recovery
- If part performance, than unjust enrichment claim for restitution of benefit conferred
- Carrig v. Gilbert-Varker Corp. p.612
  - When a court might find a contract divisible
  - Builder for sub-division builds 20 out of 35 then stops
If completed performance can be severed from the parts in breach, then can offset w/ benefit conferred
- Unbuilt houses could be severed from other completed units, builder could have value of completed houses offset damages for breach

**Breach under the UCC**
- **UCC 2-601- Perfect Tender Rule**
  - Goods & tender of delivery must be in perfect alignment with agreement or the buyer may…
    - Reject the whole
    - Accept the whole
    - Accept any commercial units and reject the rest
  - Goods must conform in every respect to the contract or buyer can reject
    - Buyer rejection subject to good faith
- **Printing Center of Texas v. Supermind Publishing Co p.614**
  - Paid deposit for printing 5,000 copies of book, when printed rejected delivery b/c failed to conform to contract- sued for deposit
    - Showed sample of white paper then used grey
    - Poorly constructed
  - Court ruled: non-conforming
- **Implied Warranty of Marketability**
  - Merchant seller’s implied warranty that the goods will pass w/out objection in the trade and are fit for their ordinary purpose (615)

**Exceptions to the Perfect Tender Standard**
- **Cure**
  - Seller sends the wrong item *early*
    - Seller still has to make the deadline, but if they notify of intent to cure and correct the error before the deadline then no breach
    - If nonconforming, but the seller thought it was ok- then reasonable time to correct
  - **Ramirez v. Autosport** p.617
    - Customer rejects tender of camper- still wet paint, let rain water damage interior, etc. sued for value of trade-in
    - Right to reject goods for any defect, does not terminate b/c seller has right to cure up to time set for performance
    - **Court Rules**: autosport failed to cure → entitled to market value of trade-in
- **Installment Contract**
  - Exception to perfect tender rule for contracts that provide delivery in installments
  - Each delivery treated as a separate contract
  - Can reject any non-conforming installment
  - If default in installments impairs value of the k as a whole then breach
    - Buyer reinstates contract if they accept installments post-breach
  - **Graulich caterer (stand) v. Hans Holterbosch (pavilion)** p.621
    - German food stand – π wants microwave hotdogs at world’s fair
    - Microwave hotdogs were not tasty- complained immediately that they did not match the contract samples
    - Did not meet industry standard
    - Subsequent installments also bad - no cure
    - **Court Rules**: justified in canceling contract
3. Frustration of Purpose or Impracticability p.537
   a. After the deal, something happened to prevent or make performance more difficult
      ▪ Must be after original agreement (time sequence requirement)
      ▪ Must be totally unexpected
   o 2 crucial issues: (1) Materiality (2) Risk Allocation
      ▪ If either party assumed the risk, that is determinative : no excuse
   o *Taylor v. Caldwell* p.539- case where concert hall burns down
      ▪ excused from obligation to provide hall or pay damages- subsequently expanded to allow impracticability beyond impossible
   o Look at relationship b/w event and performance
      ▪ Is performance made impossible by the event?
      ▪ Did the event make performance so burdensome as to excuse?
   o **Impracticability**
      ▪ Restatement on Discharge by Impracticability (UCC & Common Law are the same)
        ▪ Unless language in contract indicated contrary (assumes risk), duty is discharged by unforeseeable event making performance impracticable
      ▪ *Ling v. Board of Trustees of Doane College* p.540
        ▪ Immigrant professor : gov’t requires college to have selection process to see if U.S. workers are more qualified- selection committee finds someone else more qualified but w/ less than 1 yr to notify Ling (1 yr notification required by employment contract) Ling sues for breach
        ▪ Court Rules: college did not breach b/c impracticable to notify w/ 1 yr
          • Outside factor: could not know more than 1 yr in advance whether a more qualified U.S. citizen would apply for the position
      ▪ *Clark v. Wallace County Cooperative Equity Exchange* p.544
        ▪ Promises 4,000 bushels of corn then severe frost : only raised 2,000 – Clark wants to be excused b/c of the frost
        ▪ Court Rules: not excused for impracticability b/c he assumed the risk
          • Could purchase corn to deliver to fulfill obligation
        ▪ *Haley*: should have promised 4,000 bushels from his farm then impossible
      ▪ *Opera Company of Boston v. Wolf Trap Foundation* p.545
        ▪ ∆ agreed to pay for 4 performances- electrical storm power outage for one of the show nights- ∆ doesn’t pay for performance- claims impracticability
        ▪ implied condition that it is possible to perform
        ▪ Impracticable if performance cannot be done w/out excessive/unreasonable cost
        ▪ Elements
          • Unforeseeable intervening event
          • non-occurrence of was basic assumption of k
          • makes performance impracticable
        ▪ Dissent: power outages are foreseeable and they could have a generator
   o **Frustration of Purpose**
      ▪ Restatement on Discharge by Frustration (UCC silent on frustration of purpose)
        ▪ Unless language in contract indicated contrary (assumes risk), duty is discharged by unforeseeable event frustrating the principal purpose of performance
      ▪ *Krell v. Henry* p.551
        ▪ Rented apartment along parade route then parade was canceled
        ▪ Did not make performance (renting apartment) impossible, but where both parties know what the deal is about and event defeats the purpose even though it does not effect performance then non-performance is excused
- 7200 Scottsdale Rd. General Partners v. Kuhn Farm Machinery Inc. p.552
  - booked resort for farm machinery convention- Gulf War and terrorism make it less safe to travel & presenters are in Europe
  - frustration of purpose b/c resort providing rooms & food is worthless w/out employees and buyers there
  - Elements
    - Must be principal purpose
    - Both parties know purpose
    - Substantial affect
    - Not w/in assumed risks
    - Non-occurrence was basic assumption to k
    - contract language or circumstances don’t place risk on party seeking relief
  - resort didn’t know people in Europe were integral to convention
  - Court Rules: bound to resort for convention contract